IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	Criminal Action
	)	No. 05-00670-2
vs.	)	
	)	
KEVIN T. ORTEGA,	)	
	)	
Defendant	)	

O R D E R

NOW, this 31st day of October, 2008, upon consideration of the Supplemental Motion to Withdraw Plea of Guilty filed February 4, 2008 by defendant Kevin T. Ortega; upon consideration of the Government's Response to Defendant's Supplemental Motion to Withdraw Plea of Guilty, which response was filed February 6, 2008; after hearing and oral argument on February 7, 2008; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that the Supplemental Motion to Withdraw Plea of Guilty is denied.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge

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	)	Criminal Action
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Defendant	)	

* * *

APPEARANCES:

FRANCIS C. BARBIERI, ESQUIRE
On behalf of the United States of America

MAUREEN C. COGGINS, ESQUIRE
On behalf of Defendant Kevin T. Ortega

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on defendant Kevin T. Ortega's Supplemental Motion to Withdraw Plea of Guilty, which motion was filed February 4, 2008. The Government's Response to Defendant's Supplemental Motion to Withdraw Plea of Guilty was filed on February 6, 2008. For the following reasons, and for the reasons articulated in my August 21, 2007 ruling from the bench denying defendant's previous motion to withdraw his guilty

plea, which I incorporate here[1], I deny defendant's motion.

PROCEDURAL HISTORY

Defendant was charged with conspiracy to distribute approximately ten kilograms of crack cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A). A joint trial of defendant Ortega and two of his six co-conspirators, Edwin Colona-Santos and Edwin Molina, Jr., began on January 8, 2007. On January 11, 2007, the fourth day of trial, defendant Ortega pled guilty pursuant to a guilty plea agreement.

On April 9, 2007, prior to being sentenced, defendant, through his privately retained trial counsel, Jack J. McMahon, Jr., Esquire, filed a Petition to Withdraw Guilty Plea. On May 10, 2007, I dismissed the petition pursuant to Rule 12.1 of the Local Rules of Criminal Procedure of the United States District Court for the Eastern District of Pennsylvania because it was not accompanied by a brief or memorandum of law.[2] That same day, I granted defendant's application for continuance of his May 10, 2007 sentencing, and continued the sentencing until July 25, 2007.

On July 9, 2007, defendant filed a pro se motion to

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[1] See Notes of Testimony of the hearing conducted in Philadelphia, Pennsylvania on August 21, 2007, styled "Transcript of Hearing on Motion to Withdraw Guilty Plea before the Honorable James Knoll Gardner[,] United States District Judge" ("N.T. 8/21/07") at pages 63-84.

[2] Alternatively, I noted in my dismissal Order that I would also dismiss defendant's petition because he had not shown a "fair and just reason for requesting the withdrawal" as required by Rule 11(d)(2)(B) of the Federal Rules of Criminal Procedure.

withdraw his guilty plea. On July 11, 2007, Attorney McMahon filed a motion to withdraw defendant's guilty plea, as well as a motion to withdraw his appearance as defense counsel. By Order dated July 30, 2007, I appointed Maureen C. Coggins, Esquire, to represent defendant in connection with the two motions to withdraw the guilty plea and Attorney McMahon's motion to withdraw his appearance.

On August 21, 2007 I conducted a hearing on the motions. After testimony and closing argument, I granted Attorney McMahon's petition to withdraw his appearance and denied both motions to withdraw defendant's guilty plea. Defendant, through his counsel, filed his Supplemental Motion to Withdraw Plea of Guilty on February 4, 2008. The government's response was filed February 6, 2008. On February 7, 2008, I conducted a hearing on defendant's motion and took the matter under advisement. Hence, this Opinion.

CONTENTIONS

Defendant's Contentions

Defendant contends that his guilty plea was not voluntary, intelligent or knowing because his trial counsel, Attorney McMahon, had a conflict of interest which rendered his loyalty to defendant divided. Specifically, defendant contends that Attorney McMahon represented Reinaldo Sanchez in an unrelated state-court criminal action in Berks County,

Pennsylvania. Defendant avers that Mr. Sanchez was mentioned by grand jury witnesses in the investigation of the present case.

Defendant avers that although Mr. Sanchez was not indicted in the within federal action, his picture was shown to several cooperating co-defendants during grand jury testimony. Although defendant admits he cannot prove that the government would have called Mr. Sanchez as a prosecution witness at trial, defendant believes that Attorney McMahon's involvement with Mr. Sanchez had the potential to cause a conflict of interest.

Additionally, defendant asserts that he is actually innocent of the conspiracy charge. Moreover, defendant contends that the guilty plea colloquy conducted by me on January 11, 2007 was deficient because he was not asked if any promises had been made to him other than those set forth in the written plea agreement. Defendant further avers that if he is permitted to withdraw his guilty plea, the government will suffer no prejudice as a result. Accordingly, defendant contends that he should be permitted to withdraw his plea of guilty and proceed to trial.

Government's Contentions

The government contends that defendant has not shown that Attorney McMahon's representation of Mr. Sanchez in another, unrelated matter had any effect on his representation of defendant. Specifically, the government avers that in the course

of the investigation which led to defendant's indictment, Mr. Sanchez was not interviewed by investigators, indicted or arrested and that the government did not intend to call him as a witness. Moreover, the government argues that although Mr. Sanchez was mentioned by witnesses during the grand jury proceeding, none of the information provided by those witnesses linked Mr. Sanchez to defendant.

The government asserts that defendant's motion must fail because defendant has made only a bald assertion of innocence without a sufficient explanation of why he made a prior representation to the court that he was guilty of Count I of the Indictment. Moreover, the government avers that permitting defendant to withdraw his plea would cause prejudice to the government because such action would cause the government to undergo the expense, difficulty and risks of trying the defendant. Specifically, the government argues that it will suffer prejudice because all other defendants in this case have been convicted and the cooperating co-defendants have already been sentenced.

DISCUSSION

Once a court accepts a defendant's guilty plea, the defendant is not entitled to withdraw that plea simply at his whim. United States v. Jones, 336 F.3d 245, 252 (3d Cir. 2003). Under the Federal Rules of Criminal Procedure, a defendant may

withdraw a guilty plea before sentencing only if he can show a "fair and just reason for requesting the withdrawal." Fed.R.Crim.P. 11(d)(2)(B). Defendant bears the burden of demonstrating a "fair and just" reason, and that burden is substantial. Jones, 336 F.3d at 252 (citing United States v. Hyde, 520 U.S. 670, 676-677, 117 S.Ct. 1630, 1634, 137 L.Ed.2d 935, 942 (1997)).

In determining whether a withdrawal is permissible, the court must analyze the following three factors: (1) whether the defendant asserts his innocence; (2) the strength of defendant's reasons for withdrawing the plea; and (3) whether the government would be prejudiced by the withdrawal. United States v. Brown, 250 F.3d 811, 815 (3d Cir. 2001); United States v. Shusterman, 459 F.Supp.2d 357, 361 (E.D.Pa. 2006). If defendant fails to demonstrate that factors (1) and (2) support a withdrawal of the plea, the government is not required to show that it would be prejudiced by the withdrawal. Jones, 336 F.3d at 255.

A. Defendant's Assertion of Innocence

Bald assertions of innocence are insufficient to permit a defendant to withdraw his guilty plea. Jones, 336 F.3d at 252; Shusterman, 459 F.Supp.2d at 361. "Assertions of innocence must be buttressed by facts in the record that support a claimed defense." Jones, 336 F.3d at 252 (quoting Brown, 250 F.3d at 818). Thus, a defendant must provide credible support for any

assertion of innocence, and give sufficient reasons to explain why contradictory positions were taken before the district court. Id.

Defendant's motion at paragraph 9 of the Facts section states that "defendant asserts his innocence and wishes to withdraw his guilty plea and proceed to trial." The motion does not make any specific factual assertions supporting defendant's allegation of innocence, nor does it explain why he previously took a contradictory position before the court.

At the February 7, 2008 hearing, defendant maintained his innocence, stating that he had agreed to plead guilty based on Attorney McMahon's advice, and because Attorney McMahon told him that defendant would be permitted to go home overnight if he entered a guilty plea. Specifically, defendant testified that before entering his guilty plea, he told Attorney McMahon that if he were not permitted to go home overnight, he would withdraw his plea immediately.[3]

Defendant's bald assertion of actual innocence is insufficient. Defendant has not buttressed his claim of innocence with facts in the record which support a claimed defense. Moreover, as discussed more fully below, defendant has not given sufficient reasons for previously taking a

[3] Notes of Testimony of the hearing conducted in Allentown, Pennsylvania on February 7, 2008, styled "Hearing before the Honorable James Knoll Gardner[,] United States District Judge" ("N.T. 2/7/08"), at page 34.

contradictory position before this court, that is, why he previously averred that he committed the crime to which he pled guilty. Jones, 336 F.3d at 252.

Defendant has averred only that he believed, based on Attorney McMahon's advice, that he would be permitted to go home overnight if he pled guilty. However, as discussed below, defendant stated under oath, during the guilty plea colloquy, that he had not been made any promises in exchange for his plea other than those set forth in the written plea agreement.

Because defendant has not sufficiently supported his claim of actual innocence, I conclude that the first prong of the Brown test weighs against permitting withdrawal of the plea.

B. Strength of Defendant's Reasons for Withdrawing Plea

Defendant offers two reasons for withdrawing his guilty plea. First, he contends that his guilty plea was not voluntary, intelligent or knowing because of his trial counsel's conflict of interest. Specifically, defendant argues that Attorney McMahon's representation of Reynaldo Sanchez in another, unrelated state-court matter constitutes a conflict of interest which rendered Attorney McMahon's loyalties divided. Second, defendant averred at the February 7, 2008 hearing that the guilty plea colloquy on January 11, 2007 was deficient because he was not asked if any promises had been made to him other than those set forth in the written plea agreement.

In support of his conflict-of-interest argument, defendant testified at the February 7, 2008 hearing that he had learned from Mr. Sanchez that Sanchez had been represented by Attorney McMahon in a separate action. He also testified that grand jury witnesses identified Mr. Sanchez as another potential supplier of drugs.

Defendant avers that when he asked Attorney McMahon whether he represented Mr. Sanchez, Attorney McMahon did not confirm that he was Mr. Sanchez's lawyer and told defendant not to worry about it. Additionally, defendant contends that as a result of his alleged conflict of interest, Attorney McMahon failed to rigorously cross-examine government witnesses at defendant's trial.

Although he does not specifically frame it in this way, defendant essentially argues that he should be permitted to withdraw his plea because of the ineffectiveness of his counsel at trial, during plea negotiations, and at defendant's guilty plea hearing. Defendant alleges that an actual conflict of interest existed based on Attorney McMahon's representation of Mr. Sanchez.

The parties do not specifically address what standard should be employed when a defendant asserts ineffectiveness of counsel as the basis for withdrawing his guilty plea. Defendant's brief cites, for example, United States v. Santiago,

2008 WL 269492, at *2 (E.D.Pa. Jan. 30, 2008)(Robreno, J.) for the proposition that "[i]n cases involving an alleged conflict of interest based on defense counsel's representation of a prosecution witness, the courts have generally examined the particular circumstances to determine if counsel's undivided loyalties lie with his current client." Defendant's motion, p.3.

The government cites Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333, 346-347 (1980), a Sixth Amendment ineffectiveness of counsel case, in support of its argument that defendant's motion fails because he has not shown that an actual conflict of interest adversely affected his lawyer's performance. To prevail on a Sixth Amendment ineffectiveness of counsel claim, a defendant must establish that an actual conflict of interest adversely affected his attorney's performance. Mickens v. Taylor, 535 U.S. 162, 173-174, 122 S.Ct. 1237, 1245, 152 L.Ed.2d 291, 305 (2002).

However, I need not affirmatively resolve which framework concerning alleged attorney conflict of interest applies in this scenario. Under either framework, defendant has not established sufficient facts or precedents in support of his position. Thus, evaluating the totality of the circumstances, I conclude, as set forth below, that defendant's reasons for withdrawal are insufficient.

First, applying defendant's framework, there is no

evidence that Mr. Sanchez would have been called as a prosecution witness in defendant's trial, nor has defendant alleged that Mr. Sanchez was a grand jury witness. Defendant's contentions are that Mr. Sanchez was mentioned by grand jury witnesses, and that he believes Attorney McMahon cross-examined government witnesses less rigorously than necessary because of his involvement with Mr. Sanchez. A review of the record of this case does not reveal that Attorney McMahon actually represented a prosecution witness in this case. Therefore, the cases cited by defendant are not directly on point.

Notwithstanding the above, to the extent Attorney McMahon's loyalties may have been divided as a result of his representation of Mr. Sanchez in an unrelated case, I conclude that defendant has not shown evidence that he suffered any adverse effect as a result. Assuming, arguendo, that defendant's allegations of ineffectiveness of counsel should be evaluated as a Sixth Amendment claim for purposes of this motion, defendant's argument fails.

Defendant has only speculated that his attorney's representation of Mr. Sanchez in a separate matter resulted in an actual conflict (specifically, that Attorney McMahon did not rigorously cross-examine government witnesses because of his loyalty to Mr. Sanchez). The record of this case fails to support such allegations and defendant's own statements belie his

contentions.

With respect to Attorney McMahon's representation of defendant at trial and throughout the case, defendant Ortega specifically stated at the change-of-plea hearing on January 11, 2007 that he was satisfied with the services of his attorney and that Attorney McMahon had done everything defendant had wanted him to do in this case. Moreover, defendant stated that he was satisfied that Attorney McMahon had provided him with effective assistance as his lawyer in this case.[4] As with his claims of actual innocence, defendant has not offered satisfactory reasons for now taking a contradictory position before the court.

Therefore, because defendant has not established that an actual conflict of interest adversely affected Attorney McMahon's performance, and because defendant has not sufficiently explained having previously taken a contradictory position before the court in his guilty-plea colloquy, I conclude that defendant's first proffered reason does not support the withdrawal of his guilty plea.

Second, defendant contends that his plea was not voluntary, knowing and intelligent because he was not asked, during the guilty plea colloquy, whether promises had been made to him other than those in the written plea agreement. A review

[4] Notes of Testimony of the hearing conducted in Allentown, Pennsylvania on January 11, 2007, styled "Transcript of Change of Plea Hearing before the Honorable James Knoll Gardner[,] United States District Judge" ("N.T. 1/11/07"), at pages 38-39.

of the transcript of the January 11, 2007 change of plea hearing reveals that during the course of the hearing, Assistant United States Attorney Francis C. Barbieri, Jr. summarized the terms of defendant Ortega's guilty plea agreement. Thereafter, I asked defendant Ortega, "Did anyone make any promises to you or agreements with you other than what's contained in your written guilty plea agreement?" Defendant responded, "No promises or guarantees, just what Mr. Barbieri had mentioned."[5]

Moreover, defendant conceded at the February 7, 2008 hearing that he had answered "no" to the question of whether any promises had been made other than those set forth in the written agreement. However, he averred that such promises had, in fact, been made to him, but that he had not been asked how much those promises were influencing his decision to plead guilty.[6]

It is clear that defendant is incorrect in asserting that he was not asked whether promises had been made to him other than those set forth in the written agreement. Defendant had every opportunity to ask questions at the change of plea hearing, and specifically stated to the court that no additional promises had been made. Moreover, given defendant's answer that no additional promises had been made to him when he was considering entering a guilty plea, a follow-up question of how much those

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[5] N.T. 1/11/07, at 43-44.

[6] N.T. 2/7/08, at 34.

promises were influencing his decision to plead guilty would have been illogical.

Accordingly, I conclude that the guilty plea colloquy was not deficient for the reasons asserted by defendant at the February 7, 2008 hearing. Thus, for purposes of analyzing the second prong of the Brown test, I conclude that neither of defendant's proffered reasons weigh in favor of permitting defendant to withdraw his guilty plea.

C. Prejudice to the Government

Because I have concluded, as discussed above, that defendant has not met his burden of showing that the first two factors of the Brown test support the withdrawal of his guilty plea, the government is not required to show that it would be prejudiced by such withdrawal. Jones, 336 F.3d at 255.

Nevertheless, I conclude that permitting defendant to withdraw his guilty plea would cause the government to suffer prejudice because it would be forced to undergo the expense, difficulty and risks of trying a defendant who has already admitted his guilt and been adjudged guilty. See Brown, 250 F.3d at 815, which notes that "[a] shift in defense tactics, a change of mind, or the fear of punishment are not adequate reasons to impose on the government the expense, difficulty and risk of trying a defendant who has already acknowledged his guilt

by pleading guilty."

As I found in my August 21, 2007 ruling denying defendant's previous motion to withdraw his guilty plea, the government has already expended considerable funds to try this case in January 2007.[7] Moreover, all other defendants in this matter have been convicted and sentenced, and well over a year has elapsed since the trial commenced.

In addition, memories get dim and fade. Witnesses disappear and cannot be located. Witnesses sometimes become hesitant and reluctant to go through the ordeal of a trial a second time. Therefore, I conclude that some prejudice to the government would result from permitting defendant Ortega to withdraw his plea and proceed to trial. This prejudice weighs against permitting defendant to withdraw his plea.

Accordingly, after analyzing the factors set forth in Brown, supra, I conclude that defendant has not demonstrated a fair and just reason for withdrawal of his plea. Hyde, 520 U.S. at 676, 117 S.Ct. at 1634, 137 L.Ed.2d at 942. Accordingly, I deny defendant's Supplemental Motion to Withdraw Plea of Guilty.

CONCLUSION

For all the foregoing reasons, defendant's Supplemental Motion to Withdraw Plea of Guilty is denied.

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[7] N.T. 8/21/07, at 72-73.